No. 10-638

In The Supreme Court of the United States

NANCY J. WETHERILL,

Petitioner,

v.

JOHN MCHUGH, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a dual-status National Guard technician employed under 32 U.S.C. 709 may assert claims incident to her military service under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a) against her own state National Guard and its officers.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statement of the Case	1
Argument	9
Conclusion	19

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. United States, 143 Fed. Appx. 340 (2005) 15

American Fed'n of Gov't Employees v. FLRA, 730 F.2d 1534 (D.C. Cir. 1984) 4, 14

Bowers v. Wynne, 615 F.3d 455 (6th Cir. 2010) 18

Brown v. United States, 227 F.3d 295 (5th Cir. 2000), cert. denied, 531 U.S. 1152 (2001) 5

Charles v. Rice, 28 F.3d 1312 (1st Cir. 1994) 2

College Savings Bank v. Florida Prepaid Post Secondary Ed. Expense Bd., 527 U.S. 666 (1999) 16

Dimanni v. Rhode Island Army National Guard, 62 Fed. Appx. 937 (Fed. Cir. 2003) 15

District of Columbia v. Heller, 554 U.S. 570 (2008) 10

Feres v. United States, 340 U.S. 135 (1950) 9, 13

Fisher v. Peters, 249 F.3d 433 (6th Cir. 2001) 6

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 16

Gibbons v. Ogden, 22 U.S. 1 (1824) 10

Hans v. Louisiana, 134 U.S. 1 (1890) 16

Hodge v. Dalton, 107 F.3d 705 (9th Cir.), cert. denied, 522 U.S. 815 (1997) 5

Hupp v. United States Dep't of the Army, 144 F.3d 1144 (8th Cir. 1998) 6

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Orr, 780 F.2d 386 (3rd Cir. 1986) 16

Kimel v. Fla. Bd. Of Regents, 528 U.S. 62 (2000) 16

Maryland v. United States, 381 U.S. 41 (1965).....3, 10

Mier v. Owens, 57 F.3d 747 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996) 6

New Jersey Air National Guard v. Federal Labor Relations Authority, 677 F.2d 276 (3rd Cir. 1982) 16

Overton v. New York State Div. of Military and Naval Affairs, 373 F.3d 83 (2nd Cir. 2004) 5

Perpich v. United States, 496 U.S. 334 (1990).....11

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).....16

Singleton v. Merit Systems Protection Board, 244 F.3d 1331 (Fed. Cir. 2001).....15

United States v. Miller, 207 U.S. 174 (1939) 11

Walch v. Adj. Gen.'s Dep't, 533 F.3d 289 (5th Cir. 2008) 18

Williams v. Wynne, 533 F.3d 360 (5th Cir. 2008).....19

Zuress v. Donley, 606 F.3d 1249 (9th Cir. 2010) pet. for cert. pending No. 10-374 (filed Sept. 16, 2010) 12, 18, 19

STATUTES, REGULATION AND RULES:

Civil Rights Act of 1964, Title VII.....1, 5, 8, 9

Militia Act of 1792, Ch. XXXXIII, § 6 2

TABLE OF AUTHORITIES – Continued

Page

National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 State. 755 ..... *passim*

10 U.S.C. 802(a)(3) 2

10 U.S.C. 10102 2

10 U.S.C. 10107 3

10 U.S.C. 10113 3

10 U.S.C. 10216(a) 7, 18, 19

32 U.S.C. 709 ..... 6, 7, 18

32 U.S.C. 709(b) 4, 7, 13, 14

32 U.S.C. 709(d) 13, 14

32 U.S.C. 709(f) 11, 14

32 U.S.C. 709(f)(1) 7

32 U.S.C. 709(f)(1)(a) 1, 5

32 U.S.C. 709(f)(1)-(3) 4, 7, 13

32 U.S.C. 709(f)(3) 4, 7, 11, 17

32 U.S.C. 709(f)(4) 4, 13, 17

42 U.S.C. 2000(d) 8, 17

42 U.S.C. 2000E-2(a)(1) 8

29 C.F.R. 1614.103(d)(1) 8

MISCELLANEOUS:

H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968) 4, 12

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 616 F.3d 789. The order of the district court (Pet. App. 26a-39a) is reported at 644 F. Supp.2d 1135.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. The petition for writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case presents the question of whether a state's National Guard and its officers are required to respond to an action in federal court based on Title VII of the Civil Rights Act of 1964 brought by a National Guard dual-status military technician employed under 32 U.S.C. 709. Petitioner was required to separate from her employment as a dual-status military technician upon retirement from military service due to the application of 32 U.S.C. 709(f)(1)(a). The military decision of the South Dakota State Adjutant General which ultimately led to Petitioner's separation from her civilian employment was irreducibly military in nature making Petitioner's claims non-justiciable. Further, the military decision at issue made by the State Adjutant

General acting within the scope of powers retained by the State as a sovereign is not subject to administrative or judicial review.

a.

The National Guard is the federally recognized and organized state militia which is reserved to the states by Article I, § 8, Clauses 15 and 16 of the United States Constitution. Since the formative years of our nation each state has had a state adjutant general or equivalent to serve as the leader of that state's militia, today referred to as the state National Guard. *See* Militia Act of 1792, Ch. XXXIII, § 6.

As a reserve component of the federal military system the purpose of state National Guard units, when federalized, is to provide "[Q]ualified persons available for active duty in the Armed Forces, in time of war or national emergency, and at such other times as the national security may require, . . . " 10 U.S.C. 10102. A state's National Guard, when not federalized, is still a state militia subject to the command and control of the governor of the state and the adjutant general. *Charles v. Rice*, 28 F.3d 1312, 1315 (1st Cir. 1994). When called into active federal service members of the state National Guard become subject to the federal command authority of the President, are subject to jurisdiction under the Uniform Code of Military Justice and are assigned to duty the same as regular components of the armed forces. *See* United States Constitution Article II, § 2, Clause 1, 10 U.S.C.

802(a)(3) and 10 U.S.C. 10107, 10113. The various states have retained their sovereign right to keep and maintain a militia, recognized both by Article I, § 8, Clauses 15 and 16 of the U.S. Constitution and the Second and Tenth Amendments to the Constitution. Preexisting and inherent rights of the states in this respect have never been delegated to Congress.

b.

Military technicians have been employed by the National Guard units of the various states since the early twentieth century. These technicians received pay and benefits at various levels depending on the state National Guard unit which employed them. There was also confusion as to whether these technicians were state or federal employees for purposes of the Federal Tort Claims Act.

The issue of the Federal Tort Claims Act coverage was resolved in *Maryland v. United States*, 381 U.S. 41 (1965) when the Court held that dual-status technicians were state employees and not employees of the United States for FTCA purposes.

In order to alleviate this confusion and provide for limited federal employee status on the part of military technicians, Congress passed the National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 State. 755. An effort had been made to pass a similar act in 1967. That act would have provided full federal employee status to all National Guard technicians. The 1967 proposal failed, in part, for that very reason

based on concerns that due deference was not being paid to state sovereignty nor to the military nature of technician service. The National Guard Technicians Act of 1968 (hereafter NGTA) in its final form was intended to provide retirement and fringe benefits for workers and to recognize military requirements as well as state characteristics of the various National Guard units by providing for administrative authority and supervision at the state level. *See* H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968). *American Fed'n of Gov't Employees v. FLRA*, 730 F.2d 1534 (D.C. Cir. 1984). (*AFGE*)

A dual-status National Guard technician is recognized and defined by 32 U.S.C. 709(b). Such technicians must be members of the National Guard, hold the military grade specified by the secretary for that position, and wear a military uniform while performing their duties. 32 U.S.C. 709(b). They are required to work as civilians in their military unit, serve as members of the military with the same or related unit and may be called into active federal service. *See AFGE*, 730 F.2d at 1545.[1]

The separation of dual-status technicians from their employment is to be effected by the state adjutant general. 32 U.S.C. 709(f)(1)-(3). 32 U.S.C. 709(f)(3) further provides that "A reduction in force, removal,

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[1] The acts complained of by Petitioner in this case did not take place during a time when she was called into active federal service.

or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned; . . . ." 32 U.S.C. 709(f)(4) describes the right of appeal arising from a technician's separation from employment by the state adjutant general: "a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; . . . ."

Finally the NGTA provides that anyone employed as a dual-status technician who is separated from the National Guard or ceases to hold the military grade required shall be promptly separated from the dual-status job. 32 U.S.C. 709(f)(1)(a). Therefore, in order to continue to serve as a dual-status technician a person must continue to retain membership in a National Guard unit.

c.

The courts of appeal addressing this issue have all determined that Title VII does not apply to uniformed members of the Armed Forces and have further concluded that dual-status technicians may not assert Title VII claims based on alleged discrimination that is incident to their military service. *Hodge v. Dalton*, 107 F.3d 705, 708 (9th Cir.), cert. denied, 522 U.S. 815 (1997); *Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 96 (2nd Cir. 2004); *Brown v. United States*, 227 F.3d

295, 299 (5th Cir. 2000), cert. denied, 531 U.S. 1152 (2001); *Fisher v. Peters*, 249 F.3d 433, 443-444 (6th Cir. 2001); *Hupp v. United States Dep't of the Army*, 144 F.3d 1144, 1148 (8th Cir. 1998); *Mier v. Owens*, 57 F.3d 747, 748 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996).

Federal Respondents in their brief in opposition have discussed the uniform conclusions reached by the various courts of appeal on this issue as well as alternate remedies available to technicians in regard to service-related discrimination. State Respondents have nothing further to add on those points. *See* Federal Respondents' Brief in Opposition, p. 5-7.

d.

Petitioner is a Japanese-American woman who began working for the South Dakota Army National Guard (SDARNG) in 1974. She was commissioned as an officer in the SDARNG on July 4, 1977. She was promoted to Colonel on July 1, 1999. During a portion of this time she was employed as a dual-status technician as defined and controlled by 32 U.S.C. 709. Pet. App. 3a.

Petitioner's mandatory retirement date (MRD) – the date she was required to retire from military service – was July 31, 2007. Because of the statutory requirements related to a dual-status technician her separation from military service made her ineligible

to serve as a dual-status technician thereafter. 10 U.S.C. 10216(a) and 32 U.S.C. 709(b), (f)(1). Pet. App. 3a.

Petitioner requested then-Adjutant General of the SDARNG (Major General Michael A. Gorman) for a discretionary waiver of her mandatory retirement date so that she could remain eligible to serve as a dual-status technician. This request was granted on May 10, 2007 and approved by the National Guard on July 18, 2007. Pet. App. 4a.

General Gorman retired as Adjutant General of the SDARNG in September 2007 and was replaced by Brigadier General Steven R. Doohen.

In January 2008 General Doohen requested the National Guard revoke the discretionary extension of Petitioner's MRD. In her complaint Petitioner admits that she was advised by General Doohen that this request was made for reasons of "force management." Pet. App. 4a, Complaint ¶ 15 at 48a. The National Guard approved General Doohen's request and Petitioner's MRD was reset to July 21, 2008. Due to the application of 32 U.S.C. 709 and 10 U.S.C. 10216(a) Petitioner then became ineligible to continue to serve as a dual-status technician. As the State Adjutant General, General Doohen had the statutory authority to make decisions regarding reduction in force, removal for cause and force management. 32 U.S.C. 709(f)(1)-(3). Because of the military command decision made by the South Dakota State Adjutant General Petitioner retired from military service

and became ineligible to continue to serve as a dual-status technician.

Appeals resulting from force management decisions end with the state adjutant general pursuant to 32 U.S.C. 709(f)(4). Petitioner first filed complaints with the National Guard's Office of Equal Opportunity and Civil Rights, alleging that she had been discriminated against based on her sex and national origin. The National Guard Bureau dismissed her administrative EEO complaints because they were found to be military in nature and thus, jurisdictionally precluded from processing via the formal federal sector enforcement process used by federal civilian employees. *See* 29 C.F.R. 1614.103(d)(1). She then filed this action in United States District Court against the Secretary of the Army, the Army National Guard, State Adjutant General Doohen, and Brigadier General
Theodore Johnson and the South Dakota Army National Guard. Her complaint alleged discrimination and retaliation based on sex and/or national origin in alleged violation of Title VII, 42 U.S.C. 2000E-2(a)(1). *See* Pet. App. 4a-5a.

e.

The discussion of the actions in the courts below contained in the Federal Respondents' Brief in Opposition, p. 9-12, accurately describes the rationale and holdings of both the district court and the court of

appeals. State Respondents have no further comment on that subject.

ARGUMENT

Petitioner advances two arguments in support of her contention that this Court should grant review. First, Petitioner alleges that there are two splits among the federal courts of appeals on whether and if so how the *Feres* doctrine applies to dual-status technicians who allege employment discrimination and secondly that no doctrine such as *Feres* may be applied to affect the rights of a "federal civilian employee." Principles of the Second, Tenth and Eleventh Amendments to the United States Constitution as well as significant and consistent case law support the conclusion that a state adjutant general who exercises authority as commander of the state's militia respecting members of the militia who are not then in federal service must be free from federal restraint including free from being required to respond to claims under Title VII. In addition, no conflict among the courts of appeals exists. All courts of appeals which have addressed the issue have determined that Title VII claims asserted by dual-status technicians are ultimately non-justiciable. Finally, the Petitioner's civilian employment had a military predicate which can and in this case was affected by a command and control decision of the state adjutant general. No intervention by the federal courts is recognized or permitted. The State Respondents

therefore respectfully request that the petition for writ of certiorari be denied.

1. Present state National Guard units are the modern militia which was reserved to the states by the Second Amendment and by Article 1, § 8, Clauses 15 and 16 of the United States Constitution. This was recognized in *Maryland v. United States*, 381 U.S. 41, at 45-46. Although the National Guard in various states is now " . . . uniformed, equipped, and trained . . . " much like the regular Army the governor of the state remains in charge of the National Guard except when the guard is called into active federal service. The guards in the various states are administered by the governor through state adjutant generals. *Maryland v. United States*, 381 U.S. 41 at 46. This situation remains true today. The power of the state to train and govern its own militia has never been delegated to Congress and therefore is reserved to the states under the Tenth Amendment and recognized explicitly in the Second Amendment.

The Tenth Amendment reserves to the states all inherent attributes of sovereignty not explicitly given up elsewhere in the Constitution. *Gibbons v. Ogden*, 22 U.S. 1, 33-34 (1824). Among these inherent attributes of sovereignty is the right of the states to organize, maintain, train and discipline its own militia. The Second Amendment was adopted in part because of concerns that the power of Congress to disarm the state militia and create a national standing army was a threat to the states. *District of Columbia v. Heller*, 554 U.S. 570, 637 (Stevens, J., dissenting), citing

United States v. Miller, 307 U.S. 174 (1939). In Second Amendment cases this Court has always agreed that at a minimum the Second Amendment reserves to the states the right to maintain, train and discipline its own militia forces when those forces are not in active federal service. *Perpich v. United States*, 496 U.S. 334, 343, 347-48 (1990).

Federal courts and federal agencies are therefore explicitly restrained by the Tenth Amendment from second guessing a state adjutant general's command and control decision with respect to his state's militia forces.

There is therefore a solid constitutional basis for those provisions in the NGTA which limit appeals resulting from adverse employment actions to the state adjutant general. The statutory language in 32 U.S.C. 709(f) confirms that any actions or decisions described in 709(f)(3) including reductions in force, removal and adverse actions involving discharge from technician employment may be appealed only through the state's adjutant general. Permitting review of such a decision by a federal court or agency would contravene inherent attributes of sovereign rights implicitly reserved to the states by the Tenth Amendment. It would likewise contravene the Constitution's explicit reservation to the states in the Second Amendment of the authority retained by them to

organize, maintain, train, and discipline their militia forces.[2]

Dual-status technicians were statutorily defined and recognized by the NGTA, 32 U.S.C. 709. Supported by solid constitutional underpinnings the NGTA recognized the inherent state sovereignty over its own militia, or National Guard.

The NGTA was enacted by Congress for a limited purpose:

> a) [t]o provide a retirement and fringe benefit program which will be both uniform and adequate;
>
> b) [t]o recognize the military requirements of the State characteristics of the National Guard by providing for certain statutory administrative authority at the state level with respect to the technician program;
>
> c) [t]o clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially in the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the U.S. government. *See* H.R. Rep. No. 1823, 90th Cong., 2nd Sess. (1968).

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[2] The analysis based on the Second and Eleventh Amendment and South Dakota's inherent sovereign immunity in this area distinguishes this case from the petition presented by the Air Force Reserve technician in *Zuress v. Donley*, 606 F.3d 1249 (9th Cir. 2010) pet. for cert. pending No. 10-374 (filed Sept. 16, 2010).

Congress was careful to recognize the authority of the respective states in the NGTA. The Secretary of the Army was directed to designate that the state adjutants general employ and administer the technicians. 32 U.S.C. 709(d). Technicians are required to be members of the National Guard in order to maintain their eligibility to serve as a technician. 32 U.S.C. 709(b). The state adjutant general is made responsible for separating technicians from their employment as a result of a variety of events including decisions based on reduction in force, etc. 32 U.S.C. 709(f)(1)-(3). Finally the Act itself provides that the right of appeal from such personnel actions does not extend beyond the adjutant general. 32 U.S.C. 709(f)(4).

Not only does the doctrine of intra-military immunity as enunciated in *Feres v. United States*, 340 U.S. 135 (1950) apply to render Petitioner's claims non-justiciable but the doctrine of sovereign immunity as recognized in the United States Constitution applies to prevent the SDARNG and its officers from being subject to claims in federal court based on a military command decision made by the state adjutant general. The *Feres* doctrine supports and supplies a justification for the rulings in both the district court and the court of appeals. However, further justification exists based on the well-grounded position that the various states have retained the sovereignty to control their own National Guard and should be free from outside intervention in regard to state military decisions.

2. Petitioner was required to maintain her status in the National Guard as a prerequisite to employment as a dual-status National Guard technician under 32 U.S.C. 709(b). Her civilian employment therefore had a military predicate. When the state adjutant general made a command and control decision that effectively ended Petitioner's military career it had the concomitant effect of requiring her separation from employment as a dual-status technician.

A state National Guard includes its own internal military command and control structure and is responsible to the state adjutant general and then to the governor of the state. Maintaining its own National Guard is likely the most clearly ascertainable remaining state sovereign autonomous function of the various individual states. The NGTA recognized this by reserving and recognizing the role of state adjutants general in administering and employing technicians at the state level. 32 U.S.C. 709(d) and (f) solidified the authority of those officials by prohibiting appeals of personnel actions beyond the state adjutants general. 32 U.S.C. 709(f)(4). Subsequent legislation has recognized and confirmed that dual-status technicians are federal employees who are uniquely employed – hired, fired and disciplined – by the state adjutant general. The Court in *AFGE* recognized that such technicians are "nominal federal employees" who should not be analogized to any other federal employees except with regard to federal benefits and tort claims coverage, and further recognized: "The employment, discipline and discharge of

technicians remains completely with the state officials, and their day to day activities on the job are controlled at the state level." 730 F.2d at 1534, 1537-38. For these reasons, the court of appeals in *AFGE* rejected the contention that the adjutant general of the state of Nebraska be required to engage in collective bargaining regarding reduction in force decisions.

In *Alexander v. United States*, 143 Fed. Appx. 340 (2005), the Court held that the NGTA confirmed that state adjutants general have exclusive jurisdiction over appeals by dual-status National Guard technicians who have been separated from civilian employment for loss of membership in the National Guard – exactly the same situation faced by Petitioner here.

The Court of Appeals for the Federal Circuit has concluded that the provisions of 32 U.S.C. 709(f)(3) and (f)(4) should be applied literally. That is, there is no appeal from any adverse action involving discharge from technician employment other than to the adjutant general of the jurisdiction involved. *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1334 (Fed. Cir. 2001), and *Dimanni v. Rhode Island Army National Guard*, 62 Fed. Appx. 937, 941 (Fed. Cir. 2003). Both decisions affirmed the dismissal of dual-status technician claims to the Merit Systems Protection Board for lack of jurisdiction and failure to state a claim.

Courts have long recognized that military dual-status technicians are somewhat of a hybrid who are federal civilian employees but work in a military

environment and under the immediate control of state officers. *New Jersey Air National Guard v. Federal Labor Relations Authority*, 677 F.2d 276 (3rd Cir. 1982): "This (hybridized) role does not fit neatly within the scope of either state or national concern; historically the Guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup and function of the Guard is provided for, to a large extent, by federal law." *Johnson v. Orr*, 780 F.2d 386, 388 (3rd Cir. 1986).

3. The Constitution does not provide for federal jurisdiction over suits against nonconsenting states. *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 73 (2000), *citing, College Savings Bank v. Florida Prepaid Post Secondary Ed. Expense Bd.*, 527 U.S. 666, 669-70 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). State Respondents recognize that the Eleventh Amendment is limited by the enforcement provisions of § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) and that Congress may abrogate the Eleventh Amendment without a state's consent pursuant to its power to enforce provisions of the Fourteenth Amendment. Such intention to abrogate the Eleventh Amendment must be made unmistakably clear in the language of the statute.

Congress has affirmatively proscribed federal jurisdiction over claims that may be made by National

Guard dual-status technicians because the states retain inherent rights of sovereignty in matters concerning the organization, maintenance, training and discipline of their own militia forces. Rather than an unequivocal congressional abrogation of the state sovereignty in this area Congress has plainly indicated in the organic act which governs the National Guard that appeals of decisions concerning technicians' employment shall not lie beyond the state's adjutant general. 32 U.S.C. 709(f)(3) and (f)(4) provide:

> Notwithstanding any other provision of law . . . a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned." and further, that "a right of appeal which may exist with respect to paragraph . . . (3) shall not extend beyond the adjutant general of the jurisdiction concerned.

A more explicit provision of Congress' intent to preserve the state's Eleventh Amendment immunity and retained constitutional powers in this area is difficult to imagine.

State Respondents recognize that the federal government has authority to enforce compliance by states with anti-discrimination legislation. In complaints of discrimination in the context of Title 32 National Guard matters are addressed by 42 U.S.C.

2000(d). Although an individual cause of action does not exist for National Guard personnel, the enforcement mechanisms under this statutory provision allow the federal government to ensure that the states, in their various organizational capacities, do not engage in the types of discrimination made unlawful by Title VI of the Civil Rights Act.

Under the facts and circumstances which exist, abrogation of South Dakota's sovereign immunity should not be permitted. South Dakota retains such immunity in regard to the exercise of those preexisting and fundamentally inherent attributes of sovereignty preserved by the implicit promise of the Eleventh Amendment and other constitutional provisions.

4. State Respondents agree with Federal Respondents' brief in opposition in regard to the contention that the 1997 amendments to 10 U.S.C. 10216(a) change in any way the definition of dual-status military technicians under 32 U.S.C. 709 or create any new cause of action on behalf of such technicians. The court below rejected this same argument by Petitioner and so has every court of appeals who have addressed the question. *See, e.g., Bowers v. Wynne*, 615 F.3d 455, 466-68 (6th Cir. 2010); *Zuress v. Donley*, 606 F.3d 1249, 1254-55 (9th Cir. 2010) pet. for cert. pending No. 10-374 (filed Sept. 16, 2010);[3] *Walch v. Adj.*

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[3] State Respondents note that the petitioner in *Zuress v. Donley* was employed as a dual-status Air Force Reserve technician, not

(Continued on following page)

Gen.'s Dep't, 533 F.3d 289, 299-301 (5th Cir. 2008); and *Williams v. Wynne*, 533 F.3d 360, 366-68 (5th Cir. 2008).

CONCLUSION

A military command decision made by a state adjutant general goes to the fundamental inherent and retained rights of sovereignty arising from the unique states rights to maintain, train and discipline their own militia. This is totally consistent with the doctrine as enunciated in *Feres* but goes further and is based on constitutional and historical support. It provides even further justification for the non-justiciability of the claims asserted by Petitioner in the federal courts.

The determination as to who should serve as an officer in the state National Guard is a decision to be made by that state's adjutant general, who is responsible to the governor. The NGTA recognizes this. This concept when viewed in light of the powers reserved to the various states renders Petitioner's claims non-justiciable as does the application of the *Feres* doctrine.

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a National Guard technician. This renders some of State Respondents' arguments inapplicable to the pending petition in *Zuress*. *See also* Section 10216(a).

The petition for writ of certiorari should be denied.

Respectfully submitted,

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